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July 31, 1997

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: WT Docket No. 96-162 Ex Parte Presentation

Dear Mr. Caton:

This letter is to advise you that Michael S. Wroblewski of Latham & Watkins, David Zesiger of Independent Telephone and Telecommunication Association ("ITTA"), and Glenn Rabin of ALLTEL Corporation, met with Jackie Chorney, to discuss matters involved in ITTA's comments in the above-captioned proceeding. The attached handout also was discussed. Pursuant to Section 1.206(a)(2) of the Commission's Rules, two copies of this letter have been filed with the Secretary. Please contact the undersigned if there are any questions regarding this matter.

Respectfully submitted,

Michael S Wroblewski

Michael S. Wroblewski

cc: David Zesiger (w/o encl.)
Glenn Rabin (w/o encl.)
Jackie Chorney (w/o encl.)

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OFFICE OF THE SECRETARY

July 3, 1997

VIA HAND DELIVERY

Ms. Suzanne Toller
Legal Advisor to the Honorable Rachelle Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Re: CMRS Safeguards Processing, CC Docket No. 96-162

Dear Suzanne:

Thank you for meeting with us recently to discuss ITTA's issues in the Commission's LEC CMRS safeguards proceeding. We wanted to follow-up our discussion concerning why the regulatory approach for LEC offering of CMRS services should not follow the approach the Commission enunciated in its *Dom/Non-Dom Order*[1] to regulate LEC offering of long distance services.

As you know, when Congress enacted the Telecommunications Act of 1996, it rejected a "one-size fits all" approach to regulating LECs in favor of flexibility that considers the unique needs of smaller LECs as compared to their larger competitors. For this reason, Congress established a tri-partite regulatory framework for rural, mid-sized, and larger local telephone companies based upon their relative positions in the marketplace. The Commission's

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1 *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149, FCC 97-142 (rel. Apr. 18, 1997) ("*Dom/Non-Dom Order*").

regulations, such as those involved in this proceeding, should reflect this distinction. See attached letter from Representative Rick Boucher and 14 other Members to Chairman Reed Hundt, dated June 25, 1997.

In addition, while ITTA has argued the case against imposing separate affiliate safeguards on independent, mid-sized LEC provision of long distance services (see ITTA Comments in CC Docket No. 96-149),[2] the case against imposing such safeguards on mid-sized (and rural) LEC provision of CMRS is even more compelling. There are fundamental structural differences between LEC provision of long distance services and CMRS services that make it even more unlikely that mid-sized LECs would be able to discriminate against CMRS competitors.

In the *Dom/Non-Dom Order*, the Commission concluded that an independent LEC's control of exchange and exchange access facilities may give it the incentive and ability to engage in unlawful interconnection discrimination, cost misallocation, or a price squeeze.[3] As discussed below, because of the mobile nature of CMRS services and the manner in which they are offered, there are few, if any, incentives to engage in the anticompetitive behavior with which the Commission is concerned. Thus, there is no need to impose additional regulatory burdens when competitive market structures and existing Commission regulation provide sufficient safeguards.

For most independent LECs, the geographic scope of their CMRS service territory far exceeds that of their local exchange service area. Further, the configuration (including switch location) of the CMRS system is dependent on considerations independent of those used in the design and operation of local exchange territories. Most significant among these considerations given the mobile nature of CMRS services (as opposed to the point-to-point nature of interexchange services) are the differing population densities between the CMRS service territory and LEC territory,[4] congestion avoidance, and the need to efficiently route calls from high

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2 As ITTA intends to make clear in its petition for reconsideration, most mid-sized LECs do not maintain exchange service territories with sufficient scope to cross LATA boundaries. Consequently, most mid-sized LECs are forced to resell long distance service in both intrastate and interstate interLATA markets. Given the requirements of the Telecommunications Act of 1996, it is practically impossible for a mid-sized LEC to either discriminate against any interexchange company or in favor of a particular interexchange company whose services the LEC resells. Concerns regarding cost-shifting and other anti-competitive activities are adequately addressed through application of the Commission's existing accounting rules.

3 *Id.* at ¶ 163.

4 For example, while ALLTEL provides local exchange service to small towns outside of Charlotte, NC, it is the cellular licensee for the Charlotte MSA.

volume areas for access to, and termination from, the CMRS system. Because of these considerations and the fact that the greatest volume of CMRS calls in such situations both originate and terminate *outside* the mid-sized LEC's exchanges, mid-sized LECs generally locate their mobile switches outside of their local exchange service territories and, therefore, do not interconnect their local exchange switches with their mobile switches.

In fact, most mid-sized LECs interconnect their cellular mobile switches with other (typically, far larger) local exchange carriers in adjoining markets upon whose facilities the independent LEC's CMRS system is dependent for routing, origination and termination of CMRS calls. For example, 80% of the calls that ALLTEL cellular customers make are carried in whole or in part on networks other than ALLTEL's local exchange network. Because a mid-sized LEC generally does not interconnect with itself and is, therefore, dependent upon other carriers to carry its subscriber's calls, they generally lack the ability to discriminate in any form of interconnection. Indeed, the independent LEC stands in the same position as other CMRS carriers vis-à-vis their interconnection arrangements. Further, given the relatively low volume of calls over the entire CMRS network which may either originate in, or terminate to, an independent LEC's territory, there is little, if any, incentive to discriminate against other carriers -- to do so would only harm the service quality its own CMRS customers receive.

In addition, because mid-sized LECs are located in and around the regions of larger incumbent LECs, they have relatively little bargaining power to exert their so-called "bottleneck" control with respect to these entities in negotiating these interconnection agreements. As Congress recognized, mid-sized LECs compete against telecommunications carriers that are large global or nationwide entities that have financial and technological resources that are significantly greater than its resources.[5]

Moreover, Section 252(f) requires incumbent LECs to file these interconnection agreements with state regulatory agencies. It is standard industry practice for such agreements to contain "same-as" clauses that allow the party to take advantage of more favorable pricing, terms and conditions the incumbent LEC has negotiated with any other party. As a result, the prices, terms and conditions that are available to other incumbent LECs are, in actuality, available to all interconnecting parties (including CMRS providers that are not LEC-affiliated). Thus, the Commission's concern about mid-sized LECs engaging in a price squeeze is misplaced because of the lack of bargaining power it has with other incumbent LECs, on which it is dependent, and which, by extension, are available to all other entities seeking interconnection.

Finally, the Commission's existing cost-allocation rules, which have been applied to LEC offering of CMRS services are sufficient to detect any improper cost misallocation between the mid-sized LEC's local exchange and CMRS operations. This is especially the case for those mid-sized LECs that have elected price cap regulation.

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5 S. Rep. No. 104-23, 104th Cong., 1st Sess., at 22 (1995).

Because of the safeguards already built into the market structure, it is little wonder that, even in the absence of separate affiliate requirements, the record in this proceeding does not contain any evidence of abuse by mid-sized LEC's of its local facilities to the detriment of competition.

If you have any questions concerning these matters, please contact me at (202) 637-2147.

Sincerely,

Michael S. Wroblewski

Michael S. Wroblewski

Attachment

cc: Jackie Chorney
Rudy Baca
James Casserly
Regina Keeney
William Kennard
Daniel Phythyon
Karen Gulick
Donald Stockdale
Michael Riordan
John Nakahata
David Furth
Jane Halprin

Congress of the United States
Washington, DC 20515

June 25, 1997

The Honorable Reed E. Hundt, Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Dear Chairman Hundt:

We are writing to express our concern over the apparent trend in the Commission's regulation of mid-sized, independent telephone companies ("mid-sized companies"). In a number of recent proceedings, the Commission has imposed regulations on mid-sized companies that would significantly burden and ultimately curtail the effectiveness of these companies as a pro-competitive force in the telecommunications marketplace. We strongly urge your reconsideration of these regulatory measures.

In passing the Telecommunications Act of 1996, Congress rejected a "one-size-fits all" approach to regulating telephone companies. We recognized the need to have a flexible regulatory approach that takes into account the special needs of smaller companies vis-a-vis their larger competitors. For this reason, we established a regulatory framework addressing the separate circumstances of *three* broad categories of companies: small rural companies, mid-sized companies, and large local telephone companies.

We are concerned that the Commission's recent decisions fail to acknowledge the particular concerns of mid-sized companies and accordingly fail to limit appropriately the regulatory burdens placed on these companies commensurate with their size and unique circumstances as Congress intended.

For example, in recent orders the Commission has held that all incumbent local telephone companies may only offer in-region long distance through a separate affiliate. The Commission has also proposed a similar separate affiliate requirement for some mid-sized companies' provision of wireless services. These requirements place an unnecessary regulatory burden on mid-sized companies, most of whom have been offering services such as cellular telephony for years without the need for a separate affiliate. No persuasive showing has been made at the Commission to justify these regulatory burdens, and we urge their reconsideration.

Letter to Reed E. Hundt
--page 2--

In deliberations over the 1996 Act, Congress decided against imposing a separate affiliate requirement on the mid-sized companies for their provision of long distance and wireless services. We decided to impose a separate affiliate requirement on the largest local telephone companies only after extensive debate and only on the condition that the separate affiliate requirement would sunset three years after any such company is authorized to provide interLATA services unless the Commission extends the period by its own action. The Commission's decision to impose the separate affiliate requirement on mid-size companies' provision of in-region long distance services does not sunset until further Commission action. This decision by the Commission ignores the rejection by the Congress of the proposal to require separate affiliates for mid-sized companies and actually imposes more severe separate affiliate requirements on them, due to absence of a sunset, than the Commission has imposed on the largest local telephone companies, with respect to which the Congress did decide to require separate affiliates for a limited time. This result clearly requires reexamination.

In addition, the Commission has decided that large long distance companies are not required to establish separate affiliates for their joint offerings of local and long distance telephony. Smaller, independent telephone companies should not be subject to heavier regulatory burdens than are these companies.

Another example where the Commission has failed to address the special circumstances of mid-sized companies is in its access reform initiative. In that proceeding, the Commission decided to change the rules governing companies subject to price caps in order to reduce access charges, leaving the decision on the appropriate regulation of companies subject to rate of return rules to a later proceeding.. While this strategy was no doubt an effort to deal with the largest companies first, several mid-sized companies were caught up in the rule change because they are subject to price caps. The Commission's decision did not address the vastly different effect access reform will have on the mid-sized companies subject to price caps as compared to the larger price capped companies, even though the Commission's initial price cap decision recognized the difference between large and mid-sized companies by allowing the smaller companies to choose voluntarily price cap regulation in the first place.

Mr. Chairman, these and other examples suggest a pattern of inattention at the Commission to the differing needs of smaller, mid-sized companies and their unique potential to provide much of the competition Congress envisioned in passing the Telecommunications Act of 1996. We, therefore, strongly urge you to reconsider your decisions and in doing so assess the effect of proposed regulations on mid-sized companies as Congress intended. At a minimum, the Commission should be moving toward lessening regulation of these entities, rather than imposing costly and burdensome new regulations.

Thanking you for your attention to these comments, we are

Sincerely,

Billy Tauzin

Ralph M. Hall

Nathan Deal

Tom DeLay

Letter to Reed E. Hundt

Joe Barton

Ron Klink

Charlie Norwood

Anna Eshoo

Tom Sawyer

Letter Signatories

Rick Boucher (VA)	Billy Tauzin (LA)
John D. Dingell (MI)	Michael G. Oxley (OH)
Ralph M. Hall (TX)	Paul E. Gillmor (OH)
Sherrod Brown (OH)	Nathan Deal (GA)
Bobby L. Rush (IL)	Tom DeLay (TX)

-----------------------Page 2-----------------------

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July 30, 1997

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VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: CMRS Safeguards Processing, WT Docket No. 96-162

Dear Mr. Caton:

As the Commission continues to study the proper regulatory environment governing LEC provision of CMRS, the Independent Telephone and Telecommunications Alliance ("ITTA") demonstrates why the Court's holding in *Cincinnati Bell*[1] demands that the Commission not place additional regulatory safeguards (beyond those which the Commission currently has in place) on mid-sized LECs that offer CMRS. Such additional safeguards not only are not grounded in the Telecommunications Act of 1996, but are unnecessary to safeguard the public interest.

When Congress enacted the 1996 Act, it expressly rejected a "one-size fits all" approach to regulating LECs in favor of flexibility that considers the unique needs of mid-sized and rural LECs as compared to their larger competitors. For this reason, Congress established a tri-partite regulatory framework for rural, mid-sized, and large local telephone companies based upon their relative positions in the marketplace and their ability (or inability) to adversely affect

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1 *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752 (6th Cir. 1995) ("*Cincinnati Bell*").

competition. Specifically, mid-sized LECs, those with less than two percent of the Nation's access lines, may have different interconnection obligations than those of the largest LECs.[2] Indeed Congress recognized that mid-sized LECs may be afforded special treatment in light of their limited resources as compared to the largest LECs, cable MSOs and interexchange companies against which they compete.[3] Thus, the Commission has the necessary statutory authority by which to differentiate among different-sized LECs.

The Commission should not disregard this tri-partite regulatory structure as it considers whether additional safeguards should be placed on mid-sized LECs that offer CMRS. Indeed, the Commission should embrace the two percent standard as the statutory justification to differentiate its treatment of LECs and their offering of CMRS services. Expressly embracing the two percent distinction would avoid any risk that an alternative -- *i.e.*, naming specific companies that would be subject to regulation -- would run.[4] Specifically, there is no evidence in the record that, over the course of the past 15 years, mid-sized LECs have abused their former statutory monopoly in their offering of CMRS that would justify imposition of additional safeguards, such as separate affiliate requirements. Indeed, mid-sized LECs generally have neither the incentive nor the ability to discriminate against other mobile service providers, regardless of whether they are affiliated with a carrier, because mid-sized companies, as a result of their smaller and disparate exchange service territories, are dependent upon other LECs and IXCs for interconnection and transmission of their mobile traffic.

Moreover, regulating mid-sized LECs differently than the largest LECs is completely consistent with the Court's holding in *Cincinnati Bell*. In that case, the Court determined that the Commission should justify why it regulated Bell Company offering of cellular services differently than their offering of PCS because the two services are sufficiently similar to warrant similar regulatory treatment.[5] Thus, the Court remanded the case so that the Commission would regulate similar services (PCS and cellular) similarly. The Court expressly did not require the Commission to regulate *dissimilar* LECs similarly when they offer similar services. In fact, it has been a cornerstone of the Commission's regulatory policies for decades to treat different-sized LECs differently.

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2 *See* 47 U.S.C. § 251(f)(2).

3 In a similar vein, ITTA notes that where the size and scope of a local exchange monopoly presented competitive concerns in an adjacent market, Congress expressly enacted a safeguard requirement. *See* 47 U.S.C. § 272. Consequently, the validity of the two percent line demarcation is supported not only explicitly by virtue of the direct reference in Section 251(f)(2), but also implicitly by virtue of the limited application of Section 272 safeguards to the Bell Operating companies, and not other LECs.

4 *See e.g.*, SBC Communications challenge of Sections 271 et. seq. of the 1996 Act.

5 *Cincinnati Bell,* 69 F.3d at 767.

Any new test that the Commission develops (*i.e.*, such as an overlap test between a LEC's local exchange and CMRS territories of a certain amount that would be need to be met before imposing new safeguards) must bear a relationship to the ability of the Company to engage in the prohibited conduct. For example, the Court in *Cincinnati Bell* remanded the Commission's decision to use a 20 percent cellular attribution standard in the cellular-PCS cross-ownership rule because the Commission had not justified why that particular attribution standard was necessary to prevent an entity from engaging in the anti-competitive behavior identified.[6]

For example, a test that involves a 10 percent overlap of the POPs in a LEC's CMRS service territory with that LEC's local exchange territory test would not be able adequately to distinguish cases where a LEC would be able to exercise bottleneck control over a larger, overlapping CMRS territory because it is unlikely that a CMRS provider would directly interconnect with any LEC serving a small portion of the CMRS territory.[7] The Commission has laid no foundation for determining at what point, if any, overlapping LEC and CMRS territories might lead to a greater risk of anti-competitive behavior among CMRS providers. Thus, there is no relationship between the test for imposing new regulations and the ability of the Company to engage in the prohibited conduct. Moreover, an overlap test does not take into account either the mobile nature of CMRS (as opposed to the static nature of local exchange service) or the types of territories in question – high-volume urban areas that account for a disproportionate amount of traffic versus the outlying, largely rural, low-volume territories typically served by mid-sized LECs.

An overlap test also would perpetuate the same inequity of the current proposed cutoff (*i.e.*, only Tier 1 companies would be subject to new regulatory requirements) and would result in inconsistent application of the safeguard requirements within the various CMRS territories of the same company. This would affect, among other things, companies' strategic plans. For example, transactions involving either the purchase or sale of CMRS or LEC service territories, even if only involving a minor portion of the company's overall service territories, could well entail a change in regulatory status for part of the company's operations. The recent purchase of Pacific Telecom by Century Telephone Enterprises, combining disparate service areas 21 states, is a real example where an overlap test would require a great deal of analysis to

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6 *Id.* at 759.

7 In addition, cellular markets are MSA-based, whereas A- and B-Block PCS systems are based on much larger MTA-sized territories. Consequently, a small local exchange territory would have a relatively larger overlap of an MSA, without significantly overlapping a MTA-based PCS system. Thus, safeguards might again be imposed based upon the specific CMRS in which the LECs was licensed as opposed to any legitimate competitive concern. This is the same problem encountered and remanded by the Court in *Cincinnati Bell*.

determine whether or in which jurisdictions such a transaction might trigger additional regulatory safeguards.

The Commission's "predictive judgment" must recognize that the record before the Commission is bereft of evidence that, in the 15 years that mid-sized LECs have offered CMRS without a separate affiliate requirement, they have ever abused their former statutory local exchange monopoly in their provision of CMRS.[8] Similarly, the Commission's judgment must take into account the additional protections afforded all telecommunications carriers under the 1996 Act. Indeed, even if the Commission were to base its rule on its "predictive judgment" as to possible future behavior, the "real world" absence of any incentive to discriminate in conjunction with the fact that every mid-sized LEC has entered into at least one non-discriminatory interconnection agreement with other CMRS providers so that these providers have access to the mid-sized LEC's local facilities, should be considered as evidence that new safeguards, such as a separate affiliate requirement, are unnecessary to protect the public interest. In sum, there is no need to fix something that is not broken.

If you have any questions concerning these matters, please contact me at (202) 637-2147.

Sincerely,

Michael S. Wroblewski

Michael S. Wroblewski

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8 *Cincinnati Bell,* 69 F.3d at 760.